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No. 07-384

IN THE

# Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,
*Petitioner,*

v.

EAGLE RESEARCH CORP.,
*Respondent.*

On Petition for a Writ of Certiorari
To the Circuit Court
Of Putnam County, West Virginia

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONER

Victor E. Schwartz
Cary Silverman
*(Counsel of Record)*
Shook, Hardy & Bacon L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005
(202) 783-8400

*Attorneys for Amici Curiae*

*Additional Counsel Listed on Inside Cover*

*Of Counsel*

Jan S. Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004
(202) 637-3055

Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1850 M Street, N.W.
Suite 1095
Washington, D.C. 20036
(202) 682-1163

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, Virginia 22209
(703) 741-5000

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Pursuant to Rule 37 of the Rules of this Court, *amici curiae* request leave to file the accompanying brief in support of the Petition for a Writ of Certiorari.[1]

[1] Respondents' counsel did not consent to the filing of an *amici curiae* brief in this action. Counsel of record for all par-

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance,

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ties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. In accordance with Rule 37.6, *amici curiae* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel have made a monetary contribution to its preparation or submission.

and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

*Amici* seek leave to file a brief in this case because the issue of whether procedures employed by a court to sustain a compensatory damage award meet the minimum requirements of the Due Process Clause is of importance to each and every business in this country. If state courts are permitted to enter awards that are completely unsupported by the evidence, then businesses will be placed at substantial risk of arbitrary deprivations of their property. This risk is magnified, where, as here, summary judgment is routinely denied, post-trial review is nominal at best, and appellate review is unavailable.

The proposed amici curiae brief does not repeat the Petitioner's arguments. Rather, the brief begins by considering the public policy underlying the history and development this Court's due process jurisprudence and the principle that this tradition does not permit arbitrary compensatory damage awards. The brief then considers other instances in which this Court and others have, on the basis of procedural due process, found that a state cannot deprive an individual of life, liberty, or property in absence of supporting evidence. Finally, the brief addresses

and seeks to alleviate any potential concern of this Court that its intervention in this case could disturb the basic judicial structure of states that lack an intermediate appellate court or appellate review as a matter of right. The brief also explains why granting certiorari in this case will not place this Court in the position of acting as a court of last resort for every alleged excessive compensatory damage award.

Accordingly, a*mici* request that the Court grant this motion.

Respectfully submitted,

Victor E. Schwartz
Cary Silverman
*(Counsel of Record)*
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005
(202) 783-8400

*Attorneys for Amici Curiae*

Jan S. Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004
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1850 M Street, N.W.
Suite 1095
Washington, D.C. 20036
(202) 682-1163

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, Virginia 22209
(703) 741-5000

*Of Counsel*

Dated: October 22, 2007

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## INTEREST OF *AMICI CURIAE*[1]

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## STATEMENT OF THE CASE

*Amici* adopt and incorporate Petitioner's statement of the case.

## SUMMARY OF ARGUMENT

This case presents an important constitutional issue of procedural due process: whether a court may deprive a defendant of property by allowing a compensatory damage award that has no basis in the evidence to stand with no more than cursory pre- and post-trial procedures and no appellate review.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Here, the trial court's actions and inaction exemplify the complete lack of the most basic, fundamental procedures to ensure due process. Two statements of the trial court judge demonstrate how a jury reached a multimillion dollar compensatory damage award, without evidence that the plaintiff

experienced an actual loss, for an alleged breach of an oral contract and disclosure of trade secrets, and why that award was permitted to stand.

Early in the case, the trial court took a troubling approach in deciding a defendant's motion for summary judgment:

> [If] you've done your homework on me and you'll know what my reversal rate is. And I will tell you in the field of civil law, civil litigation, the only time I've been reversed in 14 years is when I grant summary judgment. There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. Not every time literally, but that's where it is. Our system favors taking it to a jury. And I'm going to allow all of these to go to a jury. Plain and simple. All of your's, all of the plaintiff's. Even the individual one against Mr. Butch. I don't know how you are going to argue all of this and present it to a jury. That will be your problem.

App. at 47a. In other words, the trial court expressed a blanket policy against summary judgment, even when it had concern that the facts accepted in the light most favorably to the plaintiff might not support a claim.

The court continued this hands-off approach following the trial in deciding whether to order a new trial on damages. Although the court noted that it was "most troubled" by and "struggling with" the

measure of damages in the case, the court concluded that "I'm not going to reduce it, though I am concerned with it." App. at 10a, 12a. The court expressed bewilderment at the $10.5 million in consequential damages for breach of a confidentiality agreement, noting that "I did not instruct the jury that they could take [the defendants'] profits away from them. Maybe that was what the law allowed, maybe that was a proper way, but I didn't instruct the jury that way." App. at 12a-13a. The court went on to conclude:

> And I'll be frank with you, I cannot recall now whether the plaintiffs at that time said "Judge, this is a wrong instruction, you ought to be instructing the jury that they can base the measure of damages on the lost – based on taking away profits." I don't have a memory of that. I don't think you did, I'm not sure. I can't wade through them all at this stage, and so I'm going to leave that as it is. I'm going to deny the defense motion in regard to that as well.

App. at 13a. This type of lackadaisical deliberation and abrogation of responsibility, at both the pre- and post-trial phases, raises serious questions under the Due Process Clause for the consideration of this Court. The combined import of these two actions posed an unacceptable risk of a standardless deprivation of property.

Moreover, both the trial court's approach to summary judgment and the damage award seemed premised on the availability of appellate review. Yet, West Virginia has a single appellate court in which review is discretionary. Indeed, the West Virginia

Supreme Court of Appeals denied the defendant's petition for appeal in this case. App. at 27a-28a. This further underscores the need for adequate procedural safeguards at the trial court level to comport with the minimum requirements of the Due Process Clause.

The line of jurisprudence that formed the underlying basis of this Court's conclusion in *Honda Motor Co. v. Oberg* that procedural due process requires the amount of a punitive damages award to be subject to "meaningful and adequate" post-verdict or appellate review was not confined to punitive damage awards. 512 U.S. 415, 442 (1993) (invalidating an Oregon law that precluded judicial review of the amount of punitive damage awards). In fact, this Court specifically recognized in *Oberg*, "Since there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century, no effort has been made to separate out the two classes of cases." *Id.* at 442 n.2. The case at bar provides an important opportunity for this Court to reaffirm and clarify the constitutional principle that the Due Process Clause requires some meaningful level of pre- and post-trial review as a safeguard against arbitrary or excessive compensatory damage awards. These are fundamentals of our system of jurisprudence that must be preserved.

## ARGUMENT

### I. This Court's Due Process Jurisprudence Requires Some Minimum Level of Pre- and Post-Trial Review, and Evidentiary Support, to Sustain a Damage Award

The Fifth and Fourteenth Amendments to the Constitution of the United States protect against the unfair deprivation of "life, liberty, or property, without due process of law." U.S. CONST. AMENDS. V, XIV. § 1. The words "due process" have developed over time to incorporate safeguards on both procedural and substantive elements—assuring fair notice and opportunity to be heard and proceedings that are neither conducted in an arbitrary manner nor lead to an arbitrary result. Exactly what procedures fulfill this constitutional right is the product of a complex history and tradition, and one that has proven essential to the analysis of the scope of the protection. Today, this Court is asked to consider whether that history and tradition constitutionally protects a defendant from an arbitrary compensatory damage award that has no basis in the evidence or jury instructions, that was not subject to even the most rudimentary post-trial review, and that received no appellate review.

#### A. History and Development of Due Process

Due process is the "oldest of our civil rights." Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044, 1044 (1984). This necessity of fair and impartial process derives from two sources of English law. *See* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 340 (1987). One is

Chapter 39 of the Magna Carta, which established that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by *the law of the land*." Magna Carta ch. 39 (Eng. 1215) (emphasis added); *see also Duncan v. Louisiana*, 391 U.S. 145, 169 (1968). The second source, employing the words "due process," comes from an English statute of 1354 which provided "[t]hat no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of the Law." 28 Edw. 3 ch. 3 (1354).

From these beginnings, the concept of a guaranteed right of due process gradually became embedded in American legal culture and tradition. Although the Fifth Amendment's due process clause passed with little recorded debate on the issue, it prompted several of the early states, none of which had a state constitutional due process provision, to adopt similar language. *See* Stephen Williams, *'Liberty' In the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions*, 53 U. Colo. L. Rev. 117, 121-24 (1981). Prior to the adoption of the Fourteenth Amendment, however, due process was a right that existed, but one that was rarely discussed. This Court only addressed the meaning of due process on a few occasions, holding that the challenged process must either conflict with the text of another constitutional provision or with "those settled usages and modes of proceeding existing in the common and statute law of England." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855); *see also United States v. Betsy*, 8 U.S. 443, 451 (1808)

(stating that the Fifth Amendment due process clause "means by due process of the *common* law") (emphasis in original).

Extension of due process to state action under the Fourteenth Amendment has led to considerable increase in the scope and use of the protection, and greater refinement in its meaning. *See Hurtado v. California*, 110 U.S. 516, 532 (1884) ("[T]hese broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify. . . more comprehensive interpretation.").

Until the 1960's, the history and tradition of challenged procedures generally determined their constitutional adequacy. *See, e.g., Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (holding history and tradition could permit a state to deny protection against double jeopardy), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969). While a state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness," it may not do so if "it offends some principle of justice so rooted in the traditions or conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.), *overruled on other grounds, Malloy v. Hogan*, 378 U.S. 1 (1964).

During the 1960's and 1970's, the Court moved toward a more expansive understanding of due process. *See, e.g., Malloy v. Hogan*, 378 U.S. 1, 15 (1964) ("[C]ontinuing re-examination of the constitutional conception of Fourteenth Amendment 'due process' of law is required, and that development of the com-

munity's sense of justice may in time lead to expansion of the protection which due process affords."). "Fundamental fairness" emerged as the analytical tool to guide alleged due process deprivations and expand its reach. *See Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (requiring evidentiary hearing before termination of benefits by welfare authorities). This Court has made clear that due process requires state actors deciding whether to deprive a litigant of his or her property to meet minimum procedural safeguards demanded by rudimentary due process, which include affording the recipient the opportunity to confront and cross-examine witnesses, to retain an attorney, and to present oral evidence to an impartial decision maker, whose conclusion must rest solely on the legal rules and evidence adduced at the hearing. *See id.* at 270-71.

The modern test for determining the adequacy of the process used recognizes that "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). This Court has recognized three distinct factors that guide the extent of the necessary procedures: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335. The Court requires this balancing of the public

and private interests "[t]o assure fairness." *Id.* at 348.

The once dispositive role of history and tradition in analyzing procedural due process claims, however, has not been supplanted. *See Pacific Mut. Life. Ins. Co. v. Haslip*, 499 U.S. 1, 36 (1991) (Scalia, J., concurring) (criticizing *Mathews* and other due process opinions for "indiscriminately appl[ying] balancing analysis to determine 'fundamental fairness'" without regard for historical practice). Other recent jurisprudence suggests the resurgence of history and tradition as primary factors in procedural due process review. *See, e.g., Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415, 421 (1994) (examining deviation from common law procedures in the awarding of excessive punitive damages). *Burnham v. Superior Court of Cal., Marin County*, 495 U.S. 604, 619 (1990) (holding that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of traditional notions of fair play and substantial justice") (internal quotations omitted); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729-30 (1988) (considering tradition and history to reaffirm that Due Process Clause does not bar application of the forum state's statute of limitations to claims that in their substance are and must be governed by the law of a different state). It is against this backdrop that history, tradition and principles of fundamental fairness give rise to a constitutionally protected right to some minimum level of trial court procedures, sufficient evidence in the record, and post-trial review to guard against arbitrary awards of damages.

### B. Procedural Due Process Does Not Permit Unsupported Compensatory Damage Awards

Judicial review of damage awards is a firmly embedded common law practice throughout this country and has its roots in English law and tradition. As Justice O'Connor stated plainly when this Court applied due process guarantees to a punitive damage award in *TXO Production Corp. v. Alliance Resources Corp.*, "courts at common law in England traditionally would strike any [damages] award that appeared so grossly disproportionate as to evidence caprice, passion, or bias." 509 U.S. 443, 476 (1993) (O'Connor, J., dissenting) (footnote omitted). Lord Mansfield was also led to comment that "there was no doubt but that the Court had the power of taking the opinion of a second jury in any case where the damages were excessive." *Ducker v. Wood*, 99 Eng. Rep. 1092 (K.B. 1786). This was true in cases involving both compensatory and punitive awards.

In *Oberg*, where this Court struck down an excessive punitive damages award on procedural due process grounds, Justice Stevens noted that "[a]s in many early cases, it is unclear whether this case specifically concerns punitive damages or merely ordinary compensatory damages," and "[s]ince there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century, no effort has been made to separate out the two classes of cases." 512 U.S. at 423 n.2. Given the long, and seemingly undisputed, history in which compensatory and punitive damages were reviewed for excessiveness, and that no attempt at differentiation was made at common law to ele-

vate one type of recovery for the purpose of establishing a unique constitutional right, there is no basis for separate treatment under due process. Such a distinction in the type of damages covered is unnecessary and improper for purposes of analyzing the adequacy of procedures under the Due Process Clause.

That this Court has not squarely addressed the issue of procedural due process with regard to compensatory damages should not suggest it does not apply. Indeed, the meaning of "due process of law" was sparsely discussed for the first hundred years following passage of the Fifth Amendment. Furthermore, lower courts, realizing the common law authority to overturn excessive awards, traditionally used remittitur to accomplish this same objective. *See e.g., Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 802 (Utah 1991) ("After a jury returns a damage award in a civil case, the most common way for the losing party to challenge the amount of the award is to move for a new trial or remittitur. . . ."). This Court has also stated that district courts' "discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Gasperini v. Center for Humanities*, 518 U.S. 415, 433 (1996) (holding that New York's law controlling compensatory awards for excessiveness or inadequacy can be given effect without violating the Seventh Amendment).

The traditional review process of remittitur illustrates a court's power to review the procedures used in awarding compensatory damages, and that this review must be protected under due process. The fact that remittitur is used to reduce both compensa-

tory and punitive damages awards further undercuts any distinction that would warrant separate constitutional treatment. Similarities in how courts' determine amounts for punitive damages and non-economic compensatory damages such as pain and suffering also demonstrate a need for constitutional safeguards. *See* Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J. L. & Pub. Pol'y 231, 258-61 (2003) (arguing that the arbitrary nature of non-economic damages awards demand constitutional due process protections); *see also* Robert Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L.J. 859, 907-08 (1991) (arguing that non-economic compensatory damages and punitive damages are so similar that they "cannot be analytically distinguished"). Where procedures for awarding punitive damages parallel those for compensatory recovery, there is simply no reason to create a constitutional distinction. *See Cooper Indus., Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 446-47 (2001) (Ginsburg, J., dissenting) ("One million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage.").

Moreover, as this Court expressed in *Haslip*, the level of discretion allowed in determining punitive damages "is no greater than that pursued in many familiar areas of the law as, for example, deciding . . . appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied." 499 U.S. at 20 (footnote omitted). Justice Scalia, in *TXO Production Corp.*, more directly concluded this essential point: "Procedural due process

also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)." 509 U.S. at 471 (Scalia, J., concurring).

History, tradition, fundamental fairness and the past decisions of this Court all support the conclusion that due process requires courts to provide adequate procedural safeguards against the risk of erroneous deprivation of property through a compensatory damage award inconsistent with the evidence. This Court should, therefore, grant certiorari and remove any doubts as to this important constitutional right.

## II. A DAMAGE AWARD WITHOUT EVIDENTIARY FOUNDATION IS INCONSISTENT WITH DUE PROCESS.

"[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue." *Haslip*, 499 U.S. at 59. For this reason, this Court has recognized that a state may not reach decisions on matters of life, liberty or property without a basis for its action in the evidence.

For example, in *Schware v. Board of Bar Examiners of the State of New Mexico*, the Court found that a state bar could not deny an applicant the opportunity to take the bar examination when all of the evidence produced at trial showed him to be of good moral character, while the Board "called no witnesses and introduced no evidence" and there was "nothing in the record which suggests that [the applicant] has engaged in any conduct during the past 15 years which reflects adversely on his character." 353 U.S.

232, 236, 239 (1957). This Court has also found that a state may not imprison an individual for violating the conditions of his probation where the record "was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment." *Douglas v. Buder*, 412 U.S. 430, 432 (1973) ( per curiam ); *see also Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455 (1985) (finding that revocation of "good time credits" must be supported by "some evidence" in order to satisfy the minimum requirements of procedural due process).

In some instances, federal courts have reversed compensatory damage awards purely on the basis that the evidence was insufficient to support them, without invoking the Due Process Clause. For example, several courts have invalidated awards for emotional distress stemming from alleged constitutional violations when the evidence was vague and conclusory, and did not show the need for medicine, physical symptoms, psychological disturbance or counseling, loss of income or pecuniary expense, or other corroborative evidence. *See Price v. City of Charlotte*, 93 F.3d 1241, 1255-56 (4th Cir. 1996) (citing *Carey v. Piphus*, 435 U.S. 247, 262-63 (1978); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1313 (7th Cir. 1985); *Hetzel v. County of Prince William*, 89 F.3d 169, 171-72 (4th Cir. 1996); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1304 (7th Cir. 1990); *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986)).

Indeed, this case is reminiscent of a lack of basic procedural rights that led the Tenth Circuit to reverse a district court decision upholding multi-

million dollar sanctions imposed by the Federal Trade Commission. (FTC). *See Federal Trade Comm'n v. Kuykendall*, 312 F.3d 1329 (10th Cir. 2002), *vacated on reh'g en banc*, 371 F.3d 745, 763 (2004) (agreeing with the panel that the district court failed to set forth an adequate basis for arriving at its $39 million figure). Before the corporations at issue presented their defense, the district court stated that it "sees no reason why we cannot be concluded with this matter by the close of business today," a statement the Tenth Circuit characterized as "strong medicine." *Id.* at 1340. Noting the complete lack of evidence in the record to support a $39 million compensatory award intended for consumer redress, the court stated:

> Such a casual finding of millions of dollars without one iota of explanation does not meet the fact-finding requirement of Rule 52. The court supplied absolutely no indication how it arrived at this amount—no formula, no set of guidelines, no explanation, not even the most rudimentary reckoning of cause and effect to demonstrate the extent and the manner in which the consumers had been damaged. Absent any explanation whatsoever, such an award is arbitrary and capricious.

*Id.* at 1342. Such a timeline and approach, the Tenth Circuit held, "exceeds the limits of permissible discretion and dangerously approaches a complete violation of procedural due process." *Id.*

## III. WHAT DECIDING THIS CASE WILL AND WILL NOT DO

### A. This Case Presents the Opportunity to Clarify and Reaffirm That Due Process Does Not Permit Arbitrary Awards

If this case is permitted to stand, then it will send a message that trial courts can act arbitrarily in their decision making without any significant pre-trial, post-trial, or appellate review. For example, courts could conduct trials without instructions, allow only one side of a case to be heard, or permit a $12 million award based on $12 worth of evidence or no evidence at all as was the case here.

Where, as here, a trial court has taken a "let it all go to the jury" approach and subsequently failed to conduct a thorough post-trial review to identify support, or the lack thereof, for the resulting multimillion-dollar award, due process requires appellate consideration. If the West Virginia Supreme Court of Appeals does not exercise its authority in such a case, then it falls to this Court, as the highest authority, to consider whether such an award comports with the principles of the Due Process Clause.

"When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Oberg*, 512 U.S. at 420 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948); *In re Winship*, 397 U.S. 358 (1970)). While this Court has found that "[p]unitive damages pose an acute danger of arbitrary deprivation of property" due to a jury's wide

discretion in choosing amounts and the potential for bias against big businesses, *id.* at 432, adequate pre- and post-trial review equally provides procedural safeguards against the danger of arbitrary compensatory damage awards.[2] Here, where such meaningful review was not present, this Court has an opportunity to clarify that fundamental principles of due process apply equally in such a context.

### B. This Case Will Not Unduly Interfere With State Judicial Sovereignty or Make This Court a Final Arbiter of Every Excessive Compensatory Damage Award

This Court may be concerned that granting certiorari in this case might result in a decision that effectively requires states that do not have an intermediate appellate court to change their basic judicial structure or renders this Court the final arbiter of excessive compensatory damage awards. For the reasons noted below, the Court need not fear either result.

In addition to West Virginia, seven states, Montana, New Hampshire, Nevada, Rhode Island, South Dakota, Vermont, and Wyoming, as well as the District of Columbia, have only a single appellate court or lack an appellate division. *See* National Center for State Courts, State Court Caseload Statistics, 2005: State Court Structure Charts (2006), *available at* http://www.ncsconline.org/D_Research/csp/2005_files/State%20Court%20Caseload%20Statistics%202005.pdf (providing state court structure charts,

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[2] Moreover, application of procedural due process principles to punitive damages would have little effect if punitive damages are allowed to bleed into compensatory damages.

including a summary of each court's jurisdiction). According to the National Center for State Courts, of these eight jurisdictions, only West Virginia and New Hampshire do not provide their sole appellate court with mandatory jurisdiction over most civil cases. *See id.* While several other state supreme courts have purely discretionary review of civil cases, such as Tennessee, Texas, and, Wisconsin, in those states, there is an appeal as of right in the intermediate appellate court. *See id.* In other words, West Virginia is only one of two states in the nation in which there is a high risk that an excessive verdict resulting from a lack of procedural safeguards may face absolutely no appellate scrutiny.

Nevertheless, it is not amici's contention that this Court needs to or should uproot West Virginia's appellate structure and intrude upon its sovereign prerogative to design its judiciary. Rather, the lack of appellate review in West Virginia underscores the importance, indeed essential nature, of adequate procedures at the trial court level to guard against awards that are not tied to the evidence. Here, the trial court's abrogation of its role in considering the appropriateness of summary judgment and its decision to allow a multimillion dollar award to stand, despite expressing its concerns, demonstrates a violation of due process.

Finally, a decision in this case finding that the West Virginia Circuit Court's procedures were inadequate to satisfy due process will not place this Court in the position of acting as a state appellate court of last resort for excessive compensatory damage awards. This is not simply a case of an excessive compensatory award that a state court can address

through remittitur or other traditional means. This is a case of a court that went against its own clearly stated better judgment (even when there was ultimately no appellate review) and permitted an award to stand without any evidence supporting it. It presents an ideal vehicle for this Court to instruct that the Due Process Clause requires state judiciaries to provide meaningful procedures to guard against awards that are not supported by the evidence.

## CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

Victor E. Schwartz
Cary Silverman
*Counsel of Record*
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005
(202) 783-8400

*Attorneys for Amici Curiae*

Jan S. Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004
(202) 637-3055

Robin S. Conrad
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Sherman Joyce
AMERICAN TORT REFORM
ASSOCIATION
1850 M Street, N.W.
Suite 1095
Washington, D.C. 20036
(202) 682-1163

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, Virginia 22209
(703) 741-5000

*Of Counsel*

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